

No. 11671

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United States  
Circuit Court of Appeals  
For the Ninth Circuit

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UNITED STATES OF AMERICA,  
Appellant,

VS.

SHOFNER IRON AND STEEL WORKS, a Cor-  
poration,  
Appellee.

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Transcript of Record

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Upon Appeal from the District Court of the United States  
for the District of Oregon

FILED

SEP 22 1947

PAUL P. O'BRIEN



No. 11671

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United States  
Circuit Court of Appeals  
For the Ninth Circuit

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# INDEX

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

	PAGE
Amended Complaint .....	16
Affidavit of Chester A. Sheppard .....	10
Appeal:	
Notice of .....	30
Statement of Points to be Relied Upon on	32
Designation of Record on .....	33
Statement of Points and Designation of Portions of Record to be Printed Upon	45
Certificate of Clerk .....	37, 44
Complaint .....	2
Decision .....	39
Decision on Motion to Amend Order of Feb- ruary 15, 1947 .....	25
Designation of Record .....	33
Docket Entries .....	35
Motion for Order to Serve Reconstruction Finance Corporation .....	9
Motion for Dismissal .....	23
Motion for Order of Dismissal .....	28

INDEX	PAGE
Motion to Amend Order .....	25
Names and Addresses of Attorneys of Record	1
Notice of Appeal .....	30
Order Granting Extension of Time .....	31
Order That Defendant's Motion be Denied ....	15
Order That Motion be Denied .....	28
Order in Re Opinion .....	23
Order Dismissing First Cause of Action .....	24
Order Dismissing Second Cause of Action ....	29
Return of Service of Writ .....	8
Statement of Points and Designation of Por- tions of Record to be Printed .....	39
Statement of Points to be Relied Upon on Appeal .....	32
Summons in a Civil Action .....	7

NAMES AND ADDRESSES OF ATTORNEYS  
OF RECORD

HENRY L. HESS,  
U. S. Attorney.

J. ROBERT PATTERSON and  
VICTOR E. HARR,  
Assistant U. S. Attorneys,  
U. S. Court House,  
Portland, Oregon.

A. DEVITT VANECH,  
Asst. Atty. Gen'l.

ROGER P. MARQUIS and  
WILMA C. MARTIN,  
Dept. of Justice,  
Washington, D. C.,  
For Appellant.

ALBERT M. HODLER and  
MacCORMAC SNOW,  
Pacific Bldg.,  
Portland, Oregon.

W. K. PHILLIPS and  
SHEPPARD & PHILLIPS,  
Public Service Bldg.,  
Portland, Oregon,  
For Appellee.



In the District Court of the United States  
for the District of Oregon

Civil No. 3224

UNITED STATES OF AMERICA,

Plaintiff,

vs.

SHOFNER IRON AND STEEL WORKS,

Defendant.

### COMPLAINT

The United States of America, by Henry L. Hess, United States Attorney for the District of Oregon, and J. Robert Patterson, Assistant United States Attorney, for its cause of action, says:

#### I.

This is a civil action brought by the United States and this Court has jurisdiction under Section 24(1) of the Judicial Code, 28 U.S.C. 41(1).

#### II.

Defendant is a corporation organized under the laws of the State of Oregon and authorized to do business in the State of Oregon.

#### III.

On or about September, 1942, in contemplation of acquisition of the lands hereinafter described by the Defense Plant Corporation, a wholly owned governmental corporation, said Defense Plant Corporation entered into an agreement of lease with de-



fendant, whereby Defense Plant Corporation agreed to and did lease to said defendant the following described property situated in the State of Oregon, County of Multnomah:

“Tract 1: Beginning at a point on the northeasterly line of N. W. Yeon Avenue where it intersects the division line between tracts “C” and “D” as shown upon the map of the estate of Peter Guild, deceased, as divided among the heirs, pursuant to decree of partition entered February 28, 1873, in Journal 8, page 640, J.R. 4508, and recorded in Deed Book X, page 56; thence south  $47^{\circ} 00'$  east along the said northeasterly line of N. W. Yeon Avenue, 235.24' to the most westerly corner of that certain tract of land conveyed to the United States of America by deed recorded March 5, 1937, in P. S. Book 380, page 437; thence north  $40^{\circ} 51'$  east along the northwesterly line of said tract 109.1 feet to the true point of beginning of the tract to be described; running thence north  $40^{\circ} 51'$  east 186.77 feet, more or less, to the most northerly corner of that certain [1\*] 30-foot easement heretofore conveyed to the United States of America by deed dated March 3, 1937, recorded in P.S. Deed Book 380, page 437, on March 5, 1937; thence southeasterly to the most westerly corner of that certain tract of land conveyed to Portland Linseed Oil Company by deed recorded July 7, 1888, in Deed Book 103,

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\* Page numbering appearing at foot of page of original certified Transcript of Record.

page 450; thence north  $40^{\circ} 51'$  east, along the northwesterly boundary line of the Portland Linseed Oil Company tract, 106.24 feet to the most northerly corner of said tract and in the southwesterly line of the Northern Pacific Railway Company's right of way; thence north  $48^{\circ} 43'$  west along said line of right of way, 152.75 feet; thence south  $42^{\circ} 45'$  west 282.07 feet; thence south  $47^{\circ} 00'$  east 124.76 feet to the place of beginning."

#### IV.

In accordance with the terms of said lease, Defense Plant Corporation acquired title to the foregoing described property from Shofner Iron & Steel Works by deed dated January 30, 1943, recorded as Document 2508 in Book 730 at page 329.

#### V.

Pursuant to the Act of June 30, 1945, 59 Stat. 310, Reconstruction Finance Corporation, on July 1, 1945, succeeded to all right, title and interest of Defense Plant Corporation in the aforesaid land and to all rights of said Defense Plant Corporation under said lease. Thereafter, said lease was duly terminated, in accordance with its terms, by Reconstruction Finance Corporation, said termination becoming effective as of December 5, 1945.

#### VI.

Two interim consent agreements were thereafter executed by Reconstruction Finance Corporation

whereby defendant was permitted to remain in possession until May 15, 1946. Since May 15, 1946, defendant has remained in possession of said premises without authority, right, title or interest.

## VII.

On May 24, 1946, Reconstruction Finance Corporation declared said premises and facilities surplus, pursuant to the Surplus Property Act of October 3, 1944, 58 Stat. 865, as amended, and, pursuant to said Act as amended and regulations thereunder, did transfer jurisdiction of said premises to the War Assets Administration, an administrative agency of the plaintiff, established by Executive Order 9689, dated January 31, 1946. [2]

## VIII.

Plaintiff is entitled to the possession of said premises and, although defendant has no right, title or interest therein, nor the right to possession thereof, said defendant is unlawfully and wrongfully withholding possession of the aforesaid premises from the plaintiff.

Wherefore, plaintiff prays judgment against defendant for possession of said real estate, for its costs, and for such further relief as may be proper and necessary.

HENRY L. HESS,

United States Attorney for  
the District of Oregon.

/s/ J. ROBERT PATTERSON,

Asst. United States Attorney.



United States of America,  
District of Oregon—ss.

I, J. Robert Patterson, being first duly sworn, depose and say: That I am a duly appointed, qualified and acting Assistant United States Attorney for the District of Oregon; that I am possessed of information concerning the above-named defendant, from which I have prepared the foregoing Complaint, and that the allegations contained in said Complaint are true, as I verily believe.

/s/ J. ROBERT PATTERSON.

Subscribed and sworn to before me this 12th day of August, 1946.

[Seal]                      LOWELL MUNDORFF,  
Clerk of the District Court of the United States for  
the District of Oregon.

By /s/ H. S. KENYON,  
Deputy.

[Endorsed]: Filed August 12, 1946. [3]

District Court of the United States for the  
District of Oregon

Civil Action File No. 3224

UNITED STATES OF AMERICA,

Plaintiff,

vs.

SHOFNER IRON AND STEEL WORKS,

Defendant.

SUMMONS IN A CIVIL ACTION

To the above-named Defendant:

You are hereby summoned and required to appear and defend this action and to serve upon Henry L. Hess, U. S. Attorney; and J. Robert Patterson, Assistant U. S. Attorney, plaintiff's attorney, whose address is U. S. Court House, Portland, Oregon, an answer to the complaint which is herewith served upon you, within twenty days after service of this summons upon you, exclusive of the day of service. If you fail to do so, judgment by default will be taken against you for the relief demanded in the complaint.

Date: August 13, 1946.

[Seal]

LOWELL MUNDORFF,  
Clerk of Court.

By /s/ F. L. BUCK,  
Chief Deputy Clerk.

## RETURN OF SERVICE OF WRIT

I hereby certify and return, that on the 14th day of Aug., 1946, I received the within summons & complaint and on that date served C. A. Shepherd, President of Shofner Iron Works.

/s/ JACK R. CAUFIELD,  
United States Marshal.

By /s/ FRANK L. MEYER,  
Deputy United States  
Marshal.

[Endorsed]: Filed August 19, 1946. [4]

[Title of District Court and Cause.]

### MOTION

Comes now the defendant and based upon the affidavit of Chester A. Sheppard, moves this court for an order for leave to serve the Reconstruction Finance Corporation, an agency of the United States of America, with a third party complaint and summons in order that the defendant may be permitted to assert a counter-claim in the above-entitled action for the purpose of having the entire matter adjudicated in one cause.

This motion is based on Rule 14, Rule 17, subdivision A, and Rule 13, subdivision D, of Federal Rules of Civil Procedure.

/s/ ALBERT M. HODLER,

/s/ W. K. PHILLIPS,

Attorneys for Defendant.

Due service of the foregoing Motion by copy as prescribed by law is hereby admitted, at Portland, Oregon, this 13th day of September, 1946.

/s/ J. ROBERT PATTERSON,

Attorney for Plaintiff.

[Endorsed]: Filed September 13, 1946. [5]



[Title of District Court and Cause.]

AFFIDAVIT OF CHESTER A. SHEPPARD

State of Oregon,

County of Multnomah—ss.

I, Chester A. Sheppard, being first duly sworn, depose and say:

That Shofner Iron & Steel Works is a corporation duly organized and existing under the general incorporation laws of the State of Oregon;

That on or about August 1, 1944, your affiant was elected president of the Shofner Iron & Steel Works, and has been the president of said corporation ever since said time;

That the Defense Plant Corporation was, at the time of the execution of the lease agreement mentioned in the complaint, a corporation duly organized and existing under and by virtue of the laws of the United States, having been created by the Reconstruction Finance Corporation; and that said Defense Plant Corporation was dissolved July 1, 1945, and all of its assets were transferred to and all of its functions, powers and duties and authority were assumed by the Reconstruction Finance Corporation;

That on or about September, 1942, the Defense Plant Corporation acquired the tract of land described in plaintiff's [6] complaint, which tract of land is immediately adjoining and contiguous to a

tract of land owned by the defendant; that immediately after acquiring said tract of land, the Defense Plant Corporation, through its duly authorized agents, erected and constructed a foundry building upon the tract of land described in plaintiff's complaint, and said Defense Plant Corporation caused appropriate foundry machinery to be installed in said building located on said premises; that thereafter the Defense Plant Corporation entered into an agreement of lease with the defendant wherein and whereby the Defense Plant Corporation agreed to and did lease to said defendant the real property described in plaintiff's complaint;

That on or about July 1, 1945, the Reconstruction Finance Corporation succeeded to all the right, title and interest of the Defense Plant Corporation in the land described in plaintiff's complaint, and thereafter, on December 5, 1945, the Reconstruction Finance Corporation terminated the said lease.

That thereafter the Reconstruction Finance Corporation gave permission to the Shofner Iron & Steel Works to use and occupy the said premises created by the Defense Plant Corporation, conditioned that Shofner Iron & Steel Works would keep and perform certain conditions and stipulations made by the Reconstruction Finance Corporation; that one of said conditions was that the Shofner Iron & Steel Works should carry fire insurance and public liability insurance on its building and properties, said insurance to be made payable to the Reconstruction Finance Corporation; and that

ever since said agreements were entered into between the Shofner Iron & Steel Works and the Reconstruction Finance Corporation, the Shofner Iron & Steel Works has secured and paid for fire insurance and public liability insurance payable to the [7] Reconstruction Finance Corporation, all in accordance with their said agreement, and said policies of insurance have been retained and are now held and enjoyed by the Reconstruction Finance Corporation.

Further, affiant says that the Shofner Iron & Steel Works has a good, valid and legal claim for breach of contract against the Reconstruction Finance Corporation which should be determined in this lawsuit; that said claim against the Reconstruction Finance Corporation arises out of an agreement entered into between the Defense Plant Corporation and Shofner Iron & Steel Works, by the terms of which agreement the Defense Plant Corporation agreed, in the latter part of the year 1944, to make certain changes in its plant according to plans and specifications prepared by the Shofner Iron & Steel Works; that said plans and specifications called for the expenditure of \$103,000.00. That at the time said agreement was entered into, the war in the Pacific was at its height and the combined facilities of the Shofner foundry and the Defense Plant foundry were insufficient to produce the castings required by the Army and the Navy, and the Defense Plant Corporation was anxious to have its facilities increased to the end that steel castings might be



promptly furnished to the Army and the Navy; that at said time the combined capacity of the plant of the Defense Plant Corporation and the Shofner plant was approximately 200 tons per month, and it was desirable and necessary that said capacity be increased from 200 tons per month to between 350 and 400 tons per month; that the Defense Plant Corporation required the Shofner Iron & Steel Works to prepare plans and specifications for said changes, and that Shofner Iron & Steel Works did prepare plans and specifications showing what changes were necessary in order to increase production; that thereupon the Defense Plant Corporation [8] required the Shofner Iron & Steel Works to get the approval of the War Production Board, the Steel Division and the Facilities Division, before it proceeded with the said changes; that Shofner Iron & Steel Works did get the approval of the Steel Division and the Facilities Division of the War Production Board, and turned said approval over to the Defense Plant Corporation; that upon receipt of said approval, and prior thereto, the Defense Plant Corporation promised and agreed to promptly make the changes requested in the plans and specifications so prepared; that the Defense Plant Corporation never at any time made any of the changes recommended or approved, which failure on the part of the Defense Plant Corporation injured and damaged the Shofner Iron & Steel Works more than \$250,000.00.

Affiant says that the Reconstruction Finance Cor-

poration should be brought into this litigation for the further reason that Shofner Iron & Steel Works has other rights and claims against the Reconstruction Finance Corporation that cannot be determined in this litigation without the presence of the Reconstruction Finance Corporation.

Further affiant sayeth naught, except that this affidavit is made in support of the motion to which this affidavit is attached.

/s/ CHESTER A. SHEPPARD.

Subscribed and sworn to before me this 12th day of September, 1946.

[Seal]

CARRIE BELLE CANN,

Notary Public for Oregon.

My Commission expires August 28, 1949. [9]

[Title of District Court and Cause.]

### ORDER

This matter coming on to be heard before the undersigned judge of the above-entitled Court on the defendant's motion for leave to serve the Reconstruction Finance Corporation with a third party complaint and summons, the plaintiff appearing by Henry L. Hess, United States Attorney, and J. Robert Patterson, Assistant United States Attorney, and the defendant appearing by its attorneys, Albert M. Hodler and W. K. Phillips, the Court having heard the argument of both parties and having considered the briefs submitted on behalf of both parties and being fully advised,

It Is Therefore Ordered that the defendant's motion be and the same is hereby denied and the defendant is given ten (10) days within which to appear further in this cause.

Dated at Portland, Oregon, this 15th day of November, 1946.

/s/ CLAUDE McCULLOCH,  
District Judge.

[Endorsed]: Filed November 15, 1946. [10]

[Title of District Court and Cause.]

## AMENDED COMPLAINT

The United States of America, by Henry L. Hess, United States Attorney for the District of Oregon, and J. Robert Patterson, Assistant United States Attorney, for its cause of action says:

### I.

This is a civil action brought by the United States and this Court has jurisdiction under Section 24(1) of the Judicial Code, 28 U.S.C. 41(1).

### II.

Defendant is a corporation organized under the laws of the State of Oregon and authorized to do business in the State of Oregon.

### III.

On or about September, 1942, in contemplation of acquisition of the lands hereinafter described by the Defense Plant Corporation, a wholly owned governmental corporation, said Defense Plant Corporation entered into an agreement of lease with defendant, whereby Defense Plant Corporation agreed to and did lease to said defendant the following described property situated in the State of Oregon, County of Multnomah:

“Tract 1: Beginning at a point on the northeasterly line of N.W. Yeon Avenue where it intersects the division line between tracts “C” and “D” as shown upon the map of the Estate



of Peter Guild, deceased, as divided among the heirs, pursuant to decree of partition entered February 28, 1873, in Journal 8, page 640, J.R. 4508, and recorded in Deed Book X, page 56; thence south  $47^{\circ} 00'$  east along the said northeasterly line of N.W. Yeon Avenue, 235.24' to the most westerly corner of that certain tract of land conveyed to the United States of America by deed recorded March 5, 1937, in P. S. Book 380, page 437; thence north  $40^{\circ} 51'$  east along the northwesterly line of said tract 109.1 feet to the true point of beginning of the tract to be described; running thence north  $40^{\circ} 51'$  east 186.77 feet, more or less, to the most northerly corner of that certain [11] 30-foot easement heretofore conveyed to the United States of America by deed dated March 3, 1937, recorded in P.S. Deed Book 380, page 437, on March 5, 1937; thence southeasterly to the most westerly corner of that certain tract of land conveyed to Portland Linseed Oil Company by deed recorded July 7, 1888, in Deed Book 103, page 450; thence north  $40^{\circ} 51'$  east, along the northwesterly boundary line of the Portland Linseed Oil Company tract, 106.24 feet to the most northerly corner of said tract and in the southwesterly line of the Northern Pacific Railway Company's right of way; thence north  $48^{\circ} 43'$  west along said line of right of way, 152.75 feet; thence south  $42^{\circ} 45'$  west 282.07 feet; thence south  $47^{\circ} 00'$  east 124.76 feet to the place of beginning."

## IV.

In accordance with the terms of said lease, Defense Plant Corporation acquired title to the foregoing described property from Shofner Iron & Steel Works by deed dated January 30, 1943, recorded as Document 2508 in Book 730 at Page 329.

## V.

Pursuant to the Act of June 30, 1945, 59 Stat. 310, Reconstruction Finance Corporation, on July 1, 1945, succeeded to all right, title and interest of Defense Plant Corporation in the aforesaid land and to all rights of said Defense Plant Corporation under said lease. Thereafter, said lease was duly terminated, in accordance with its terms, by Reconstruction Finance Corporation, said termination becoming effective as of December 5, 1945.

## VI.

Two interim consent agreements were thereafter executed by Reconstruction Finance Corporation whereby defendant was permitted to remain in possession until May 15, 1946. Since May 15, 1946, defendant has remained in possession of said premises without authority, right, title or interest.

## VII.

On May 24, 1946, Reconstruction Finance Corporation declared said premises and facilities surplus, pursuant to the Surplus Property Act of October 3, 1944, 58 Stat. 865, as amended, and, pursuant to said Act as amended and regulations there-

under, did transfer jurisdiction of said premises to the War Assets Administration, an administrative agency of the plaintiff, established by Executive Order No. 9689, dated January 31, 1946. [12]

### VIII.

Plaintiff is entitled to the possession of said premises and, although defendant has no right, title or interest therein, nor the right to possession thereof, said defendant is unlawfully and wrongfully withholding possession of the aforesaid premises from the plaintiff.

For a second cause of action, plaintiff complains and alleges:

#### I.

Plaintiff refers to and corporates by reference in his second cause of action paragraphs one and two of the plaintiff's first cause of action.

#### II.

That on or about the 28th day of September, 1943, the defendant by a written agreement of lease with plaintiff, agreed to and did lease to the said plaintiff the following described property situated in the State of Oregon, County of Multnomah:

Parcel 1—Beginning at the intersection of the Northeasterly line of N.W. Yeon Avenue with the division line between Tracts C and D as shown upon the map of the estate of Peter Guild, deceased, as divided among the heirs pur-



suant to decree of partition entered February 28, 1873, Journal 8, page 640, J.R. 4508 and recorded in Deed Book X, page 56, Records of Deeds of Multnomah County, Oregon; thence South  $47^{\circ} 00'$  East along said Northeasterly line of N.W. Yeon Avenue 110.48 feet; thence North  $40^{\circ} 51'$  East 109.1 feet to the most Southwesterly corner of the property now owned by the Defense Plant Corporation; thence North  $40^{\circ} 51'$  East 10.9 feet along the Northwesternly boundary of the property now owned by the Defense Plant Corporation; thence North  $47^{\circ} 00'$  West 150 feet; thence South  $40^{\circ} 51'$  West 120 feet to the said Northeasterly line of N. W. Yeon Avenue; thence South  $47^{\circ} 00'$  East 39.52 feet to the place of beginning.

Parcel 2—Beginning at the intersection of the Northeasterly line of N.W. Yeon Avenue, with the division line between Tracts C and D as shown upon the map of the estate of Peter Guild, deceased, as divided among the heirs, pursuant to decree of partition entered February 28, 1873, Journal 8, Page 640, J.R. 4508, and recorded in Deed Book X, page 56; thence North  $47^{\circ} 00'$  West 39.52 feet to the true point of beginning; thence North  $40^{\circ} 51'$  East 120 feet; thence South  $47^{\circ} 00'$  East 150 feet to the Northwesternly boundary of that property now owned by the Defense Plant Corporation; thence North  $42^{\circ} 45'$  East 89.1 feet; thence North  $47^{\circ} 00'$  West 288.30 feet; thence South  $40^{\circ} 51'$  West 209.10 feet to the Northerly line

of N.W. Yeon Avenue; thence South 47° 00' East 138.30 feet to the true point of beginning.

### III.

By the terms of the said lease, the defendant leased to the plaintiff the said property from the 28th day of September 1943 to and including the 23rd day of March 1963, and that the plaintiff had complied with all the conditions of the said lease and that the plaintiff is entitled to the possession of the said premises and although defendant has no right to the possession thereof, said defendant is unlawfully, and wrongfully, withholding possession of the aforesaid property from the plaintiff.

Wherefore, Plaintiff prays judgment against the defendant for possession of the said real estate, and for costs and disbursements incurred herein, and for such further relief as may be proper and necessary.

HENRY L. HESS,

United States Attorney for  
the District of Oregon.

/s/ J. ROBERT PATTERSON,

Assistant United States  
Attorney.

United States of America,  
District of Oregon—ss.

I, J. Robert Patterson, being first duly sworn, depose and say: That I am a duly appointed, qualified and acting Assistant United States Attorney for the District of Oregon; that I am possessed of information concerning the above-named defendant,

from which I have prepared the foregoing Complaint, and that the allegations contained in said Complaint are true, as I verily believe.

/s/ J. ROBERT PATTERSON.

Subscribed and sworn to before me this 26th day of November, 1946.

LOWELL MUNDORFF,  
Clerk of the District Court of the United States for  
the District of Oregon.

By /s/ H. S. KENYON,  
Deputy. [14]

United States of America,  
District of Oregon—ss.

I, J. Robert Patterson, Assistant United States Attorney for the District of Oregon, hereby certify that I have made service of the foregoing Amended Complaint, Civil No. 3224, by depositing in the United States Post Office at Portland, Oregon on the 26th day of November, 1946, duly certified copies thereof, enclosed in envelopes, with postage thereon prepaid, addressed to Albert M. Hodler, Attorney at Law, 1208 Public Service Building, Portland, Oregon and MacCormac Snow, Attorney at Law, Pacific Building, Portland, Oregon, Attorneys for the Defendant.

/s/ J. ROBERT PATTERSON,  
Assistant United States  
Attorney.

[Endorsed]: Filed November 26, 1946. [15]



[Title of District Court and Cause.]

MOTION

Comes the defendant and moves the above entitled court for the dismissal of the above entitled cause or in the alternate for the striking from the files thereof of the complaint and the amended complaint.

The ground of this motion is that neither the complaint nor the amended complaint states a claim on which relief can be granted (F.R.C.P. 12-B-6) and for the reason that the plaintiff is not the real party in interest. (F.R.C.P. 17-A)

/s/ MacCORMAC SNOW,  
/s/ ALBERT M. HODLER,  
Attorneys for Defendant.

Service of the within motion is admitted this 5th day of December, 1946.

/s/ VICTOR E. HARR,  
Of Attorneys for Plaintiff.

[Endorsed]: Filed December 5, 1946. [16]

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[Title of District Court and Cause.]

ORDER IN RE OPINION

The Court hands down its opinion and directs that an order be prepared in accordance therewith.

February 6, 1947. [17]



[Title of District Court and Cause.]

### ORDER

This cause coming on to be heard on the motion of defendant for dismissal of the above-entitled cause or in the alternate for the striking from the files thereof of the complaint and the amended complaint, and the court having heard the argument of counsel for the parties and examined briefs on behalf of the parties, now therefore it is

Considered and Ordered as follows:

1. The first cause of action alleged in the amended complaint shall be and is hereby dismissed and said first cause of action is stricken from the files.

2. The said motion is denied with respect to the original complaint.

3. The said motion is denied with respect to the second cause of action alleged in the amended complaint.

Dated this 13 day of February, 1947.

/s/ R. LEWIS BROWN,  
Judge.

Portland, Ore. Approved as to form, Feb. 11,  
1947.

J. ROBERT PATTERSON,  
Ass't. U. S. Attorney.

[Endorsed]: Filed February 15, 1947. [18]

[Title of District Court and Cause.]

MOTION

Comes now the Plaintiff by Henry L. Hess, United States Attorney for the District of Oregon, and J. Robert Patterson, Assistant United States Attorney, and moves the Court to amend that certain Order entered in the above entitled cause on the 15th day of February, 1947, so as to provide and grant the Plaintiff five days within which to file its amended Complaint, naming the Reconstruction Finance Corporation as a party plaintiff in this cause.

Dated at Portland, Oregon, this 19th day of February, 1947.

HENRY L. HESS,

United States Attorney for  
the District of Oregon.

/s/ J. ROBERT PATTERSON,

Asst. United States Attorney.

[Affidavit of service by mail attached.]

[Endorsed]: Filed February 19, 1947. [19]

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[Title of District Court and Cause.]

DECISION ON MOTION TO AMEND ORDER  
OF FEBRUARY 15, 1947

Plaintiff moves the Court as follows: Comes now the Plaintiff by Henry L. Hess, United States Attorney for the District of Oregon, and J. Robert Pat-

terson, Assistant United States Attorney, and moves the Court to amend that certain Order entered in the above entitled cause on the 15th day of February, 1947, so as to provide and grant the Plaintiff five days within which to file its amended Complaint, naming the Reconstruction Finance Corporation as a party plaintiff in this cause.

The Order referred to in the motion after the entitlement of court and cause is as follows: "This cause coming on to be heard on the motion of defendant for dismissal of the above entitled cause or in the alternate for the striking from the files thereof of the complaint and the amended complaint, and the court having heard the argument of counsel for the parties and examined briefs on behalf of the parties, now therefore it is

"Considered and Ordered as follows:

"1. The first cause of action alleged in the amended complaint shall be and is hereby dismissed and [20] said first cause of action is stricken from the files.

"2. The said motion is denied with respect to the original complaint.

"3. The said motion is denied with respect to the second cause of action alleged in the amended complaint.

"Dated this 13 day of February, 1947.

"Signed R. Lewis Brown, Judge."

Paragraph No. 1 of said Order is a final decision and is appealable. *Wright v. Gibson*, 9 Cir., 128 F. 2d 865.

The motion before the Court is in effect an application to amend a judgment and does not set forth a ground or reason for the modification or amendment asked, and is not an application for a mere formal or clerical amendment based on matters appearing in the record.

Judge McColloch, by Order of November 15, 1946, in this cause, denied a motion by defendant to serve Reconstruction Finance Corporation with a third party complaint and summons, said motion having been opposed by plaintiff.

Finally, even if the power to do so exists, I am reluctant to amend, modify or otherwise disturb orders of Judge Brown and Judge McColloch appearing in the files and records of this case.

Plaintiff's motion to amend that certain Order in the above entitled cause entered on the 15th day of February, 1947, is denied.

Dated: This 6th day of March, 1947.

/s/ ROGER T. FOLEY,

United States District Judge.

[Endorsed]: Filed March 6, 1947. [21]



[Title of District Court and Cause.]

### ORDER

This cause coming on to be heard on the motion of the plaintiff for the allowance of time within which to file its amended complaint naming Reconstruction Finance Corporation as a party plaintiff, and the court having heard the arguments of the parties and being fully advised,

Now, Therefore It Is Considered and Ordered, that the said motion be and the same is hereby denied.

Dated this 11th day of March, 1947.

/s/ ROGER FOLEY,

Judge.

Endorsed:

Filed March 11, 1947. [22]

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[Title of District Court and Cause.]

### MOTION

Comes Now Plaintiff above named by and through Henry L. Hess, United States Attorney for the District of Oregon and Victor E. Harr, Assistant United States Attorney and moves the Court for an order of Dismissal without prejudice of the second cause of action of the Plaintiff's amended complaint in the above entitled Court and cause.

Dated at Portland, Oregon this 14th day of March, 1947.

HENRY L. HESS,  
United States Attorney for  
the District of Oregon.

/s/ VICTOR E. HARR,  
Asst. United States Attorney.

United States of America,  
District of Oregon—ss.

Service of the within Motion is hereby accepted within the State and District of Oregon, on the 14th day of March, 1947 by receiving a copy thereof duly certified to as a true and correct copy of the original by Victor E. Harr, Assistant United States Attorney for the District of Oregon.

/s/ MacCORMAC SNOW,  
Attorney for Defendant.

Endorsed:

Filed March 17, 1947. [23]

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[Title of District Court and Cause.]

### ORDER

This matter coming on to be heard upon motion of plaintiff for an order of dismissal without prejudice of the second cause of action and the Court having considered said motion and being fully advised;

It Is Ordered that the plaintiffs second cause of action in plaintiff's amended complaint in the above entitled Court and cause be and the same is hereby dismissed without prejudice.

Dated at Portland, Oregon, this 17th day of March, 1947.

/s/ CLAUDE McCOLLOCH,  
Judge.

Endorsed:

Filed March 17, 1947. [24]

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[Title of District Court and Cause.]

### NOTICE OF APPEAL

To: Shofner Iron and Steel Works, Defendant  
above named, Portland, Oregon, and Sheppard  
& Phillips, Attorneys for Defendant:

You and each of you will please take notice that the Plaintiff, United States of America, appeals to the Circuit Court of Appeals for the Ninth Circuit, from the Decision of District Judge R. Lewis Brown, rendered February 6, 1947.

HENRY L. HESS,

United States Attorney for  
the District of Oregon.

/s/ VICTOR E. HARR,

Asst. United States Attorney.



United States of America,  
District of Oregon—ss.

Service of the within Notice of Appeal is hereby accepted within the State and District of Oregon, on the 2nd day of May, 1947, by receiving a copy thereof duly certified to as a true and correct copy of the original by Victor E. Harr, Assistant United States Attorney for the District of Oregon.

SHEPPARD & PHILLIPS,  
Of Attorneys for Defendant, by  
DS.

Endorsed:

Filed May 2, 1947. [25]

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[Title of District Court and Cause.]

### ORDER

This Matter coming on to be heard before the undersigned Judge of the above entitled court on the Motion of the Plaintiff to extend the time to and including the 2nd day of July, 1947, within which to file the record on appeal and docket the action, and it appearing to the court that there is good cause and that it is proper to grant the extension of time, and the court being fully advised,

It Is Therefore Ordered that the Plaintiff be, and it is hereby granted an extension of time to and including the 2nd day of July 1947, within which to file an appeal and docket the action.

Dated at Portland, Oregon, this 4th day of June, 1947.

/s/ CLAUDE McCOLLOCH,  
Judge.

[Title of District Court and Cause.]

STATEMENT OF POINTS TO BE RELIED  
UPON ON APPEAL

The United States of America, plaintiff in the above-entitled case, makes the following statement of points to be relied upon on appeal:

1. The District Court erred in dismissing the amended complaint of the United States of America insofar as the first cause of action is concerned.

2. The District Court erred in holding that the United States was not the real party in interest.

3. The District Court erred in holding that the United States was not a proper party to maintain the action.

4. The District Court erred in holding that the Reconstruction Finance Corporation was the real party in interest.

5. The District Court erred in holding that only the Reconstruction Finance Corporation could maintain the action.

Respectfully submitted,

/s/ A. DEVITT VANECH,

Assistant Attorney General,

Washington, D. C.

/s/ HENRY L. HESS,

United States Attorney,

Portland, Oregon.

/s/ ROGER P. MARQUIS,

/s/ WILMA C. MARTIN,

Attys., Department of Justice,

Washington, D. C. [27]

[Affidavit of service by mail attached.]

[Endorsed]: Filed June 19, 1947. [28]

[Title of District Court and Cause.]

DESIGNATION OF RECORD

To: The Clerk of the District Court of the United States for the District of Oregon:

The United States of America, plaintiff, designates the following as the record to be forwarded to the United States Circuit Court of Appeals for the Ninth Circuit, in the appeal of the above-entitled case:

1. Complaint and summons
2. Motion of Defendant to allow service of Reconstruction Finance Corporation
3. Affidavit of Chester A. Sheppard, to support Motion to allow service of Reconstruction Finance Corporation, dated September 12, 1946
4. Order, dated November 15, 1946, denying Defendant's Motion to serve Reconstruction Finance Corporation
5. Amended Complaint
6. Motion, dated December 5, 1946, to dismiss
7. Decision and Order, dated February 6, 1947
8. Order, dated February 13, 1947
9. Motion of Plaintiff, dated February 19, 1947, to amend Order

10. Decision on Motion, dated March 6, 1947, to amend Order

11. Order, dated March 11, 1947, denying Motion for allowance of time to amend complaint

12. Motion of Plaintiff, dated March 14, 1947

13. Order, dated March 17, 1947, dismissing second cause of action in Plaintiff's amended complaint [29]

14. Notice of Appeal by Plaintiff

15. Order, dated June 4, 1947, extending time to docket appeal

16. Designation of Record (District Court)

17. Statement of Points (District Court)

Respectfully submitted,

/s/ A. DEVITT VANECH,

Assistant Attorney General,  
Washington, D. C.

/s/ HENRY L. HESS,

United States Attorney,  
Portland, Oregon.

/s/ ROGER P. MARQUIS,

/s/ WILMA C. MARTIN,

Attys., Department of Justice,  
Washington, D. C.

[Affidavit of service by mail attached.]

[Endorsed]: Filed June 19, 1947. [30]



[Title of District Court and Cause.]

## DOCKET ENTRIES

1946

- Aug. 12 Filed complaint.
- Aug. 13 Issued summons—to Marshal.
- Aug. 19 Filed summons with Marshal's return.
- Aug. 23 Filed stipulation for extension of time to Sept. 16, for defendant to plead.
- Aug. 28 Filed and entered order allowing defendant to Sept. 16, 1946 to plead or answer.
- Sept. 13 Filed defendant's motion to serve Reconstruction Finance Corporation with Third Party Complaint and summons.
- Sept. 23 Record of hearing on above motion.
- Nov. 15 Filed and entered order denying motion to serve Reconstruction Finance Corporation and allowing 10 days for defendant to appear.
- Nov. 25 Filed stipulation and entered order allowing defendant to and including Dec. 5, 1946 to appear.
- Nov. 26 Filed amended complaint.
- Dec. 5 Filed motion of defendant for order of dismissal, or to strike complaint.

1947

- Jan. 4 Entered order setting hearing on motion of defendant for order of dismissal or to strike complaint for Jan. 15, 1947—10 a.m.
- Jan. 15 Record of hearing on motion of defendant to dismiss or to strike complaint and amended complaint from the files, plain-

1947

tiff 5 days for brief; defendant 5 days thereafter to file reply brief.

Jan. 20 Filed plaintiff's brief.

Feb. 6 Filed opinion granting motion to dismiss amended complaint as to first cause of action and denying motion to dismiss as to second cause of action.

Feb. 6 Entered order setting for trial on March 18, 1947.

Feb. 7 Entered order reserving all motions and preliminary matters to time of pre-trial and trial.

Feb. 15 Filed and entered order dated Feb. 13, 1947, dismissing first cause of action in amended complaint, and striking first cause of action from files, denying motion to strike original complaint and denying motion to dismiss or strike second cause of action.

Feb. 19 Filed motion to amend order of Feb. 15, 1947.

Feb. 20 Entered order re-setting for trial on March 21, 1947.

Feb. 28 Entered order setting hearing on motion to amend order of Feb. 15, 1947, for March 3, 1947, 10 a.m.

Mar. 3 Record of hearing on motion of plaintiff to amend order of Feb. 15.

Mar. 6 Filed decision on motion to amend order of Feb. 15.

1947

- Mar. 11 Filed and entered order denying motion of plaintiff for allowance of time to file amended complaint naming Reconstruction Finance Corporation as a party plaintiff.
- Mar. 17 Filed motion for order of dismissal without prejudice as to 2nd cause of action.
- Mar. 17 Filed and entered order of dismissal without prejudice as to 2nd cause of action.
- May 2 Filed appeal by United States.
- June 3 Filed motion for an order extending time.
- June 4 Filed and entered order granting plaintiff to July 2, 1947, to file appeal.
- June 19 Filed designation of record.
- June 19 Filed statement of points to be relied upon on appeal. [32]
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In the District Court of the United States  
for the District of Oregon

United States of America,  
District of Oregon—ss.

I, Lowell Mundorff, Clerk of the United States District Court for the District of Oregon, do hereby certify that the foregoing pages numbered from 1 to 33 inclusive constitute the transcript of record on appeal from a judgment of said court in a cause therein numbered Civil 3224, in which the United States of America is plaintiff and appellant, and the Shofner Iron and Steel Works is defendant and appellee; that the said transcript has been prepared by me in accordance with the designation of contents of record on appeal filed by the appellant, and

in accordance with the rules of court; that I have compared the foregoing transcript with the original record thereof, and that it is a full, true and correct transcript of the record and proceedings had in said court in said cause, in accordance with the said designation as the same appears of record and on file at my office and in my custody.

In Testimony Whereof I have hereunto set my hand and affixed the seal of said court in Portland, in said District, this 27th day of June, 1947.

[Seal]                      LOWELL MUNDORFF,  
Clerk.

By /s/ F. L. BUCK,  
Chief Deputy. [33]

[Endorsed]: No. 11671. United States Circuit Court of Appeals for the Ninth Circuit. United States of America, Appellant, vs. Shofner Iron and Steel Works, a Corporation, Appellee. Transcript of Record. Upon Appeal from the District Court of the United States for the District of Oregon.

Filed June 30, 1947.

/s/ PAUL P. O'BRIEN,  
Clerk of the United States Circuit Court of Appeals  
for the Ninth Circuit.



In the District Court of the United States for the  
District of Oregon

No. 3224—Civil

UNITED STATES OF AMERICA,  
Plaintiff,  
vs.

SHOFNER IRON AND STEEL WORKS,  
Defendant.

### DECISION

Defendant moves to dismiss the action or to strike from the files the complaint and amended complaint upon the grounds (a) that neither the complaint or the amended complaint states a claim upon which relief can be granted, and (b) that the plaintiff is not the real party in interest.

As the amended complaint supersedes the original complaint no motion of any kind can now be addressed to the original complaint as it performs no function in the action and the motion is denied in its entirety as to the original complaint.

Defendant contends that the Reconstruction Finance Corporation is the real party in interest and relies upon subdivision (a) of Rule 17 of the Rules of Civil Procedure, which provides where material here "Every action shall be prosecuted in the name of the real party in interest," and Subdivision (b) where material provides "The capacity of a corporation to be sued shall be determined by the law under which it was organized."

The Reconstruction Finance Corporation was organized by an Act of Congress as a corporation, Section 601, et seq., Title 15, U. S. C. A. By Section 604 of the same Title it is specifically given the authority to sue and be sued. Plaintiff alleges in the amended complaint that the Reconstruction Finance Corporation is the owner of the real property; that the defendant now holding possession was originally let into possession of the property by it as its tenant although the period of tenancy has expired; it alleges that it has declared the real property surplus and transferred "jurisdiction" to the War Assets Administration for disposal, and that Administration has the right of present possession, of necessity, so that it may dispose of the property. It does not follow of necessity that the War Assets Administration must possess the property physically in order to dispose of it any more so than a real estate broker must physically possess the home of its client in order to dispose of the home. However that may be, it is apparent that the War Assets Administration does not have possession of the property and cannot get it except as a result of litigation that it itself cannot undertake in its own name, and the question presented is, who is the party properly to carry forward the litigation, in other words the real party in interest?

The Reconstruction Finance Corporation and the United States are not the same or the same entities.

The Reconstruction Finance Corporation is a corporate agency of the government which is its sole stockholder, 15 U. S. C. A. 601. It is managed

by a Board of Directors appointed by the President, by and with the advice and consent of the Senate. It has wide powers and conducts financial operations on a vast scale. While it acts as a governmental agency in performing its functions, its transactions are akin to those of private enterprises, but it is not the sovereign and does not possess the immunities that the sovereign does possess, *Reconstruction Finance Corporation v. Menihan Corp., et al.*, 312 U. S. 81. It is an entity in law, separate and apart from the United States.

Congress must have contemplated, in giving to the corporation the vast powers that it gave to it in transacting its multifarious business, that in so doing it would probably acquire causes of action against others and for that reason it gave the corporation the power to sue. Equally, it was within the contemplation of Congress, that in transacting the multifarious business it had a right to transact, it might give to others a cause of action against it, and gave to those others the right to sue the corporation, each right being a valuable right to the one possessing it under the act of Congress. It thus could not be contended by the defendant, if the action were brought in the name of the Reconstruction Finance Corporation, that the United States was the proper party in interest and the action should be maintained in its name. Equally, if one possessing a cause of action against the Reconstruction Finance Corporation should sue that corporation the corporation could not well move to dismiss the action on the ground that the United States and not



the corporation was the real party in interest as defendant. I do not believe the Congress, in giving to the corporation the power to sue, in effect gave to it an election to maintain the action in its own name, or in the name of the United States, as it might appear in each particular action to be to the particular advantage for some reason of the corporation to sue in the name of the United States rather than in its own name. Ordinarily causes of action possessed by the Reconstruction Finance Corporation are its causes of action and not causes of action of the United States or of the United States and the corporation jointly, and as to those causes of action and except where special circumstances appear from the pleading, which do not appear here, the corporation is the real party in interest and not the United States. To hold otherwise might deny a defendant a valuable right which it might have as a party litigant against the Reconstruction Finance Corporation if the action were brought in its name which it could not or would not have if the action were brought in the name of the United States alone. The case of *Reconstruction Finance Corporation v. Menihan Corp.*, *supra*, is an illustration, for there the defendant was successful and being successful was entitled to a money judgment for its costs that it would not have been entitled to had the action been permitted to be maintained in the United States.

It necessarily follows that the motion made in so far as the first cause of action is concerned is meritorious and ought to be sustained on both of its grounds. The United States, not being the real



party in interest, of course cannot state a claim upon which relief can be granted.

As to the second cause of action, it is alleged that the defendant leased the real property to the plaintiff from the 28th day of September, 1943, to and including the 23rd day of March, 1963; that the plaintiff is entitled to the possession of the property and that defendant unlawfully withholds possession of the property from the plaintiff. The question presented being that the plaintiff is not the real party in interest, as the transaction was had, as appears from the second cause of action, between the plaintiff and the defendant and not between the defendant and the Reconstruction Finance Corporation, there is nothing in the allegations of the second cause of action that leads to the conclusion that anyone else except the plaintiff is or could be the real party in interest and the motion to dismiss as to the second cause of action ought to be denied.

It Is Therefore Ordered that the motion to dismiss the amended complaint is granted in so far as the first cause of action is concerned and denied as to the second cause of action.

Done and dated this 6th day of February, 1947.

R. LEWIS BROWN,

United States District Judge.

[Endorsed]: Filed February 6, 1947.

United States of America,  
District of Oregon—ss.

I, Lowell Mundorff, Clerk of the United States District Court for the District of Oregon, do hereby certify that the foregoing copy of Decision in Cause No. Civil 3224, United States of America vs. Shofner Iron and Steel Works has been by me compared with the original thereof, and that it is a correct transcript therefrom, and of the whole of such original, as the same appears of record and on file at my office and in my custody.

In testimony whereof I have hereunto set my hand and affixed the seal of said court at Portland, in said District, this 11th day of August, 1947.

[Seal]                      LOWELL MUNDORFF,  
Clerk,  
By /s/ F. L. BUCK,  
Chief Deputy Clerk.

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[Endorsed]: No. 11671. United States Circuit Court of Appeals for the Ninth Circuit. United States of America, Appellant, vs. Shofner Iron and Steel Works, a Corporation, Appellee. Supplemental Transcript of Record. Upon Appeal from the District Court of the United States for the District of Oregon.

Filed August 13, 1947.

/s/ PAUL P. O'BRIEN,  
Clerk of the United States Circuit Court of Appeals  
for the Ninth Circuit.

In the United States Circuit Court of Appeals  
for the Ninth Circuit

No. 11671

UNITED STATES OF AMERICA,  
Appellant,  
vs.

SHOFNER IRON AND STEEL WORKS,  
Appellee.

STATEMENT OF POINTS AND DESIGNA-  
TION OF PORTIONS OF RECORD TO BE  
PRINTED

The United States of America, appellant in the above-entitled case, adopts the statement of points filed in the district court as the statement of points to be relied upon in this Court and desires that the whole of the record as filed and certified be printed in its entirety.

Respectfully submitted,

/s/ A. DEVITT VANECH,  
Assistant Attorney General,  
Washington, D. C.

/s/ ROGER P. MARQUIS,  
/s/ WILMA C. MARTIN,  
Attys., Department of Justice,  
Washington, D. C.

[Endorsed]: Filed July 11, 1947.

